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## The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts

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# The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts

Francesca Bignami†

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## Introduction

In October 1970, the heads of state of what was known at the time as the European Economic Community proclaimed, “[A] united Europe must be founded upon the common heritage of respect for the liberty and the rights of men.”<sup>1</sup> Decades later, at the celebration of the fiftieth anniversary of the European Union (EU), the heads of state of today’s European Union echoed that earlier proclamation:

In the European Union, we are turning our common ideals into reality: for us, the individual is paramount. His dignity is inviolable. His rights are inalienable. Women and men enjoy equal rights. We are striving for peace and freedom, for democracy and the rule of law, for mutual respect and

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† Professor of Law, Duke University School of Law. Many thanks to Mattias Kumm, Peter Lindseth, Thérèse Murphy, and Ulf Öberg for their comments.

1. European Community, Foreign Ministers of the Six European Cmty. Countries, *First Report of the Foreign Ministers to the Heads of State and Government of the Member States of the European Community*, Part One ¶ 5 (Oct. 27, 1970), reprinted in EUROPEAN FOREIGN POLICY: KEY DOCUMENTS 76 (Christopher Hill & Karen E. Smith eds., 2000).

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shared responsibility, for prosperity and security, for tolerance and participation, for justice and solidarity.<sup>2</sup>

This vision of Europe, one resting not simply upon economic convenience but upon a common tradition of rights and democracy, is a persistent theme in the history of European integration. With the legitimacy crisis of the 1990s, it also has become a pressing theme of European integration.<sup>3</sup> Rights, according to some, might serve as the building blocks of a common European identity.<sup>4</sup> Europe might not have a single cultural, linguistic, ethnic, or religious tradition, as did the nation-states of the nineteenth century, but it does, according to constitutional theorists, possess a liberal democratic tradition of self-government and individual rights.<sup>5</sup> Based on this commonality, Europeans might recognize themselves as rights-bearing and duty-owing members of a single society.

Constitutional patriotism, as this form of identity has been called, holds tremendous promise.<sup>6</sup> Yet, because constitutional patriotism serves to bind a community together, it carries some of the dangers associated with the other historically dominant form of community—the nation-state. Nineteenth- and twentieth-century nationalism was belligerent, intolerant, and monolithic.<sup>7</sup> Why should we think that twenty-first-century constitutional patriotism will be any different? In other words, in the European search for solidarity, the core principles of liberal democracy might be undermined. The practice of constitutional patriotism might very well betray its normative aspirations of tolerance and inclusiveness.

Although the dark side of constitutional patriotism has been remarked by many, there have been few attempts to scrutinize Europe's emerging constitutional culture for signs of intolerance.<sup>8</sup> Such illiberalism can be manifested in many ways: foreigners might be unreasonably excluded through immigration policies, ethnic and religious minorities might not be treated fairly, or diversity among the national communities that constitute the European Union might be suppressed in the interest of greater unity.

This article examines attitudes towards national diversity in one piece of the emerging European Constitution—the right to privacy. There is a

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2. Declaration on the Occasion of the Fiftieth Anniversary of the Signature of the Treaties of Rome, Mar. 25, 2007, available at [www.eu2007.de/de/News/download\\_docs/Maerz/0324-RAA/English.pdf](http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf).

3. See, e.g., J.H.H. Weiler et al., *European Democracy and Its Critique*, 18 WEST EUR. POL. 4 (1995).

4. See Gráinne de Búrca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 WASH. & LEE L. REV. 555, 573 (2004).

5. See Mattias Kumm, *Why Europeans Will Not Embrace Constitutional Patriotism*, 6 INT'L J. CONST. L. 117, 120 (2008).

6. See generally JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (2007); Jan-Werner Müller & Kim Lane Scheppele, *Constitutional Patriotism: An Introduction*, 6 INT'L J. CONST. L. 67 (2008).

7. See Michael Howard, *War and Nations*, in NATIONALISM 254, 254-55 (John Hutchinson & Anthony D. Smith eds., 1994).

8. See, e.g., J.H.H. Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, 3 INT'L J. CONST. L. 173, 186-87 (2005).

thick constitutional culture of privacy in Europe.<sup>9</sup> The familiar debate of how to balance the right to privacy against freedom of expression, the market, and public security can be heard in many places: before the European Court of Justice and the European Court of Human Rights; in the European Parliament and the European Council; and before Europe's numerous data privacy ombudsmen. In these places, the less familiar problem of tolerance of diversity among Europe's different national communities also arises. These communities all recognize a private sphere that sometimes deserves to be protected and that sometimes must give way to the demands of others. Yet these same communities also differ in their definition of the private sphere and the circumstances under which this private sphere must be sacrificed for the sake of other values, such as freedom of expression.<sup>10</sup> Thus, the right to privacy poses squarely the dilemma of constitutional patriotism: Can a right that is common to all of Europe nonetheless acknowledge and accommodate national diversity?

This article proceeds as follows. Part I presents the theory of constitutional patriotism and the related concept of constitutional tolerance. Part II moves to the right to privacy. It outlines the legal framework for the right to privacy, with special attention to data protection because of the historically important role of this policy area in the European Union. Part III explores the challenge of diversity for European constitutionalism by comparing two recent judgments involving a similar issue of privacy law but decided by two different European courts: *Criminal Proceedings Against Bodil Lindqvist*, decided by the European Court of Justice (ECJ),<sup>11</sup> and *Von Hannover v. Germany* (Princess of Monaco), decided by the European Court of Human Rights (ECtHR).<sup>12</sup> Both cases examined the relationship between privacy and freedom of expression, but while the ECJ deferred to the national court's resolution of the matter, the ECtHR decided the question and did so contrary to the national court's ruling.<sup>13</sup>

Based on the theory of constitutional patriotism, the last section argues in favor of the deferential approach taken by the ECJ. Although the doctrinal tools available to the two courts differ, the same deferential result could be accomplished by the ECtHR through greater resort to its doctrine of margin of appreciation. In doing so, the ECtHR would recognize, as the Court of Justice has done, that the answer to many difficult questions of

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9. See Francesca Bignami, *European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609, 610 (2007) [hereinafter Bignami, *European Versus American Liberty*].

10. See *Campbell v. Mirror Group Newspaper, Ltd.*, [2004] UKHL 22, [2004] A.C. 457, ¶ 11 (appeal taken from Eng.) (U.K.); *Von Hannover v. Germany*, App. No. 59320/00, 40 Eur. H.R. Rep. 1, 23 (2005).

11. Case C-101/01, *Criminal Proceedings Against Lindqvist*, 2003 E.C.R. I-12971.

12. *Von Hannover*, 40 Eur. H.R. Rep. 1.

13. *Lindqvist*, 2003 E.C.R. at I-13024 ("[I]t is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with other general principles of the Community law . . ."); see also *Von Hannover*, 40 Eur. H.R. Rep. at 27-29.

constitutional law can only be found in the thick institutional and cultural setting of national constitutional orders. The European constitutional order is still too thin to settle many of the heated conflicts among rights-holders that emerge routinely at the national level.

This favorable assessment of the ECtHR's margin of appreciation is somewhat controversial. Many human rights scholars have criticized the ECtHR's resort to the doctrine as the abandonment of rights, morality, and reason in the face of powerful, oppressive states.<sup>14</sup> Deference to the member states, according to the critics, represents capitulation to repressive human rights practices. Other commentators, however, have defended the margin of appreciation, both from a moral theory of rights<sup>15</sup> and from a pragmatic position related to the limits of international law.<sup>16</sup> This analysis adds to the earlier defenses of the margin of appreciation by revealing the constitutional nature of ECtHR adjudication. Given the frenetic pace of European integration and the importance of the ECtHR in affirming rights, the ECtHR today should be regarded as not simply an international human rights tribunal but also a constitutional court. The ECtHR, like the ECJ, is entrusted with a critical element of Europe's constitutional self-identity—fundamental rights. In other words, the ECtHR is an institutional guarantor of European constitutional patriotism. In adjudicating rights, therefore, the ECtHR should be self-conscious of the importance of fundamental rights in their particular, geographic and historical instantiations to national self-identities and local solidarities. Before resolving any particular rights conflict—like the clash between privacy and speech in *Von Hannover*—the ECtHR should consider whether indeed the best constitutional order for Europe would instead be tolerance of national diversity.

## I. Constitutional Patriotism

The idea that a constitution not only organizes power within a society but also provides a source of allegiance that enables the formation of that society is commonly associated with German political theory.<sup>17</sup> As Jan-Werner Müller explains, the circumstances of post-war Germany placed the Basic Law and the Constitutional Court at the heart of German political culture.<sup>18</sup> The Constitutional Court has been immensely successful at resolving highly contentious political disputes.<sup>19</sup> Today, therefore, the Constitutional Court is one of the most highly respected institution in Ger-

14. See, e.g., Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 847 (1999); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 731-32 (2006).

15. See, e.g., Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 61-63 (2003).

16. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 315-17 (1997).

17. See Jan-Werner Müller, *A 'Thick' Constitutional Patriotism for the EU?: On Morality, Memory and Militancy*, in LAW AND DEMOCRACY IN THE POST-NATIONAL UNION 375, 378 (Erik Odvar Eriksen et al. eds., 2006).

18. See *id.*

19. See *id.* at 380.

man political life.<sup>20</sup> At the same time, the Basic Law emerged as the focal point in the struggle to defend the German state against the twin threats of neo-fascism and communism.<sup>21</sup> German citizens were urged, based on their allegiance to the democratic values and civil liberties enshrined in the Basic Law, to reject political extremism and come to the defense of German democracy.<sup>22</sup>

In the view of many thinkers, a constitution for the European Union would engender a similar form of allegiance, not to any particular national order, but to a Europe-wide political community.<sup>23</sup> Probably the best-known exponent of constitutional patriotism for the European Union is the renowned political philosopher Jürgen Habermas.<sup>24</sup> According to Habermas, the democratic deliberation facilitated by the adoption of a constitution would promote identification with the European project.<sup>25</sup> This form of constitutionalism would engender genuinely post-national citizenship,<sup>26</sup> because individuals would develop a sense of belonging to a Europe-wide community based on their participation in a democratic process, not based on their blood ties or cultural background.<sup>27</sup>

As many have pointed out, deliberative democracy is a very demanding form of rule by the people.<sup>28</sup> Citizens are called upon to constantly re-examine and revise their values and interests in communication with other citizens that inhabit the public sphere. For the normative ideal to be achieved, four key criteria must be satisfied. First, deliberation must be inclusive; all citizens should have the opportunity to participate in the deliberation. Second, the citizens who participate in the deliberation must have equality of voice. They must all be heard and considered. Third, in the deliberation, deliberative as opposed to strategic rationality must prevail. Agreement must come from genuine consensus on the political principle under discussion. In other words, decisions must be made through appeal to commonly accepted reasons—what Habermas calls validity claims—not through bargaining among competing interests.<sup>29</sup> Such bargaining is considered harmful to democracy because certain interests inevitably wield more power than others and therefore dominate the bargaining process. Moreover, even if power could be assumed away, collective deci-

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20. *Id.* at 378.

21. *See id.* at 380, 382–83.

22. *See id.*

23. *See* Jürgen Habermas, *Why Europe Needs a Constitution*, *NEW LEFT REV.*, Sept.–Oct. 2001, at 5, 15–16 (2001) (outlining philosophical groundwork for the idea now known as constitutional patriotism).

24. *See, e.g.,* Müller, *supra* note 17, at 380–83 (discussing Habermas).

25. *See* Habermas, *supra* note 23, at 16.

26. *See id.*

27. *See id.*

28. *See, e.g.,* Jack Knight & James Johnson, *Aggregation and Deliberation*, 22 *POL. THEORY* 277 (1994).

29. *See* Thomas Gehring, *Communicative Rationality in European Governance? Interests and Communicative Action in Functionally Differentiated Single Market Regulation*, in *EUROPEAN GOVERNANCE, DELIBERATION, AND THE QUEST FOR DEMOCRATISATION* 57, 74 (Erik O. Eriksen et al. eds., 2003).

sion-making based on compromises among particularistic interests is not capable of obtaining the common good. Last, deliberation must continue indefinitely until consensus is reached. Given the limits on the time and resources that can be dedicated to deliberation, consensus on every item on the public agenda is unattainable. Therefore, in the absence of consensus, a decision must be taken temporarily, following a commonly accepted procedural rule.

Deliberative democracy is not only an extremely ambitious form of democracy, but it is also highly universalistic. Under this theory, the society that self-governs could very well be the world, not simply a particular nation or region. Unlike deliberative democracy in American political theory, which is rooted in the republican tradition, Habermas's starting point is man's universal capacity for language.<sup>30</sup> The basic similarities underpinning language are the grounds for claiming that all individuals share the same "communicative rationality" through which they can reach agreement on matters of common concern.<sup>31</sup> An individual's capacity to recognize others as equals in the deliberative enterprise is rooted in reason, not in geography or history. Thus, it should be possible to agree that the essentials of deliberative democracy be extended to all.

For these reasons, the version of constitutional patriotism expounded by Habermas has given rise to deep skepticism.<sup>32</sup> The type of reason and universalism required by Habermas's theory is considered to be too far removed from the realities of human nature for deliberative democracy to be achievable.<sup>33</sup> But the idea of constitutional patriotism—the possibility of European citizenship based on the liberal ideals contained in a constitution and experienced as part of a constitutional culture—has had enormous purchase in Europe. This idea spurred the long process that culminated in the Constitution for Europe. Of course, that Constitution failed in popular referenda held in France and the Netherlands.<sup>34</sup> Nevertheless, the possibility of rooting European citizenship in a set of commonly held ideals about the right and good mode of conducting life in a human community persists.<sup>35</sup>

The liberal values found in most modern constitutions can only be considered virtuous. Yet building allegiance to a community based on such values is problematic. The act of subscribing to a single set of beliefs—even virtuous ones—carries the danger of suppressing alternative beliefs. In other words, constitutional patriots might not tolerate dissent from their version of the right and good. This intolerance might not be shown only to

30. See William Rehg, *Habermas's Discourse Theory of Law and Democracy: An Overview of the Argument*, in *HANDBOOK OF CRITICAL THEORY* 166, 170-71 (David M. Rasmussen ed., 1996).

31. See Gehring, *supra* note 29, at 69.

32. See, e.g., John P. McCormick, *Habermas, Supranational Democracy, and the European Constitution*, 2 *EUR. CONST. L. REV.* 398, 398-99 (2006).

33. See *id.* at 412-23.

34. *EU Constitution: Where Member States Stand*, BBC NEWS, March 25, 2007, <http://news.bbc.co.uk/2/hi/europe/3954327.stm>.

35. See Kumm, *supra* note 5, at 120.

those extremists bent on destroying liberal values, such as neo-Nazi and militant Communist parties.<sup>36</sup> It might also silence legitimate disagreement about the correct interpretation and application of critical elements of the liberal democratic canon. Jans-Werner Müller incisively frames the critique:

[C]ivic nationalism—under which one is tempted to subsume constitutional patriotism—is still nationalism, and not automatically less fraught with danger in contrast with cultural nationalism. In particular, it still aims at homogeneity among citizens in a way that would have been recognizable to antiliberals like Carl Schmitt as indispensable for democracy, and that more or less directly endangers values such as inclusiveness, individualism, and diversity.<sup>37</sup>

The irony of intolerant constitutional patriotism is especially acute in the European Union. There, hostility towards diversity not only betrays the values at the core of liberal democracy but also undermines the constitutional system already in place. Among legal scholars, Joseph Weiler has put forward the most exhaustive analysis of the dangers of constitutional patriotism for the European Union.<sup>38</sup> The most fundamental attribute of the European constitutional system to have emerged over the years, Weiler argues, is constitutional tolerance.<sup>39</sup> In accepting the authority of the pronouncements of the European Court of Justice, national courts allow the views of other political communities to shape the constitutional fabric of their own community.<sup>40</sup> As Weiler puts it, European law is “accepted as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe, to a norm which is the aggregate expression of other wills, other political identities, other political communities.”<sup>41</sup> Likewise, the European Court of Justice defers to the views of national courts in fashioning European law.<sup>42</sup> From this relationship of mutual deference, Weiler draws the conclusion that a written European constitution, adopted by a constitutional convention, is undesirable.<sup>43</sup> Whether such a constitution would indeed undermine constitutional tolerance, as Weiler argues, is debatable.<sup>44</sup> But the important point is that the European constitutional order is intrinsically pluralist, and any effort to impose a hegemonic belief system in the interest of constitu-

36. See generally ROGER GRIFFIN, *MODERNISM AND FASCISM: THE SENSE OF A BEGINNING UNDER MUSSOLINI AND HITLER* (1995).

37. Jan-Werner Müller, *Three Objections to Constitutional Patriotism*, 14 *CONSTELLATIONS* 197, 201 (2007).

38. See J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7, 7–23 (J.H.H. Weiler & Marlene Wind eds., 2003).

39. See *id.*

40. See Treaty Establishing the European Community art. 10, Mar. 25, 1957, 298 U.N.T.S. 11.

41. Weiler, *supra* note 38, at 21.

42. See Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 *COLUM. J. EUR. L.* 241, 272, 279 (2005).

43. See Weiler, *supra* note 38, at 21–23.

44. See *id.*



tional patriotism would be antithetical to the character of Europe. In fashioning a constitutional identity for Europe, therefore, it is imperative that the courts and other law-making institutions permit legitimate disagreement over the content of that identity. It is essential to preserve constitutional tolerance.

## II. The Right to Privacy

The right to privacy is a perfect vehicle for exploring the tension between constitutional patriotism and constitutional tolerance. The right to privacy has long been an element of the European constitutional system,<sup>45</sup> yet it is an element on which national constitutional systems display considerable variation. Privacy claims routinely clash with other claims: my right to keep certain matters to myself conflicts with the right of others to learn about me for the purpose of public debate, market transactions, public security, and more. How a constitutional system mediates between the right of secrecy and the right to know is a defining feature of that society and one that varies tremendously among political communities. How such pluralism has been handled in Europe can offer guidance on the more general problem of reconciling a single set of European constitutional ideals with national diversity.

The European right to privacy is the product of two distinct but overlapping political systems: the European Union and the Council of Europe. Historically, the Council of Europe came first.<sup>46</sup> The Council of Europe system also has the broadest coverage: the application of the right to privacy in the Council of Europe system was never limited to certain domains of state activity as it was in the European Union, with its focus on the market. However, today, especially in the domain of data privacy, the European Union is the more important system. Compared to the Council of Europe, it has a denser framework of laws and administrative instruments with a tighter enforcement system of regulators and courts.<sup>47</sup>

The two political systems overlap because of the influence that the first-in-time one has been able to exert over the later-in-time one.<sup>48</sup> As is well known, the European Court of Justice looks to the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights to establish new rights.<sup>49</sup> Furthermore, the European Union's legislation on data privacy draws on the earlier Council of Europe Convention in that area.<sup>50</sup>

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45. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222.

46. See CLAIRE OVEY & ROBIN WHITE, *JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 3 (4th ed. 2006).

47. See Bignami, *European Versus American Liberty*, *supra* note 9, at 647-48.

48. See *id.* at 643.

49. See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXTS, CASES, AND MATERIALS* 323-30 (3d ed. 2003).

50. See Bignami, *European Versus American Liberty*, *supra* note 9, at 644.

A. Council of Europe

1. *European Convention on Human Rights*

The right to private life is protected under Article 8 of the European Convention of Human Rights.

Article 8—Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>51</sup>

Initially, the European Court of Human Rights interpreted the right of privacy to apply only against the government and only in those situations in which the space or the type of fact fit squarely with commonplace understandings of what counted as private.<sup>52</sup> As with other Convention rights, however, the Court soon acknowledged that the right to privacy applied not just against the government but also against other individuals because states should be held responsible for all rights violations occurring within their territories.<sup>53</sup> The Court also gradually expanded those categories of information deemed to be private and therefore protected under the right to private life.<sup>54</sup> Today, any information about a person, no matter how banal or how widely known, is considered private as long as it is systematically stored and collected.<sup>55</sup> Likewise, even behavior in a public place is considered private if it is recorded and disseminated in a manner that could not reasonably have been anticipated by the individual concerned.<sup>56</sup>

Under the case law of the Court, an interference with the right to private life must satisfy three conditions to be considered legal.<sup>57</sup> First, if the processing is done by a public authority or for a public purpose, it must be authorized by a law, accessible to the public, and it must have sufficiently precise provisions to curb arbitrary government action and to put citizens on notice of possible incursions into their private sphere.<sup>58</sup> Second, the

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51. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, art. 8.

52. IAIN CAMERON, NATIONAL SECURITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 91-101 (2000).

53. See generally *Von Hannover v. Germany*, App. No. 59320/00, 40 Eur. H.R. Rep. 1 (2005) (applying Article 8 to case of privacy violation by the media).

54. CAMERON, *supra* note 52, at 70-101.

55. *Segerstedt-Wiberg v. Sweden*, App. No. 62332/00, 44 Eur. H.R. Rep. 2, ¶¶ 71-72 (2007).

56. *Von Hannover*, 40 Eur. H.R. Rep. at 23.

57. Francesca Bignami, *Privacy and Law Enforcement in the European Union: The Data Retention Directive*, 8 CHI. J. INT'L L. 233, 242 (2007) [hereinafter Bignami, *Privacy and Law Enforcement*].

58. See *Amann v Switzerland*, 2001-I Eur. Ct. H.R. 245, 266.

purpose of the interference must be legitimate.<sup>59</sup> Namely, the purpose must be related to one of the categories listed in Article 8.<sup>60</sup> It must be “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”<sup>61</sup>

Third, the interference with private life must be proportional.<sup>62</sup> The proportionality inquiry generally consists of three distinct steps.<sup>63</sup> First, is there evidence that government action can achieve the stated purpose?<sup>64</sup> Second, is the government action necessary for accomplishing the stated purpose or would alternative means accomplish the same purpose with a lesser burden on the privacy right?<sup>65</sup> Finally, even though there might be no alternative means for accomplishing the same purpose, is the burden on the right to privacy nonetheless intolerable, requiring the law to be withdrawn?<sup>66</sup> The burden of justification under the proportionality test lies with the government and varies tremendously, depending on the gravity of the interference with the right to private life and the public interest being pursued: the more significant the interference, the higher the burden on the government; the more important the public purpose, the lower the burden on the government.<sup>67</sup>

## 2. *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*

Long before the European Court of Human Rights interpreted the right to privacy to apply broadly to any type of information about a person, a specific set of rules relating to personal data was negotiated by the members of the Council of Europe.<sup>68</sup> The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data was adopted in 1980 and was opened for ratification in January 1981.<sup>69</sup> As of May 2007, it has been ratified by thirty-eight of the forty-six members of the Council of Europe and it has been signed but not ratified by six more member states.<sup>70</sup> The rules contained in the Convention apply to all those

59. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 45, art. 8.

60. See *id.*

61. *Id.*

62. See Bignami, *Privacy and Law Enforcement*, *supra* note 57, at 242.

63. *Id.* at 246.

64. *Id.*

65. *Id.*

66. *Id.*

67. See Case C-317/04 & C-318/04, *European Parliament v. Council of the European Union*, 2006 E.C.R. I-4721, ¶¶ 227–30.

68. See *id.* ¶¶ 228–30.

69. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data art. 5(b), Jan. 28, 1981, Eur. T.S. No. 108 [hereinafter *Personal Data Convention*]; see COLIN J. BENNETT & CHARLES D. RAAB, *THE GOVERNANCE OF PRIVACY: POLICY INSTRUMENTS IN GLOBAL PERSPECTIVE* 72 (2003).

70. Council of Europe, *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*, <http://conventions.coe.int/Treaty/Commun/>

engaged in personal data processing—market actors, the media, government agencies, and others.<sup>71</sup>

For purposes of understanding the legal rules contained in the Convention, it is useful to divide personal data processing into a number of different phases: collection, storage, use, and dissemination to third parties. Under the Convention, personal data must be “obtained and processed fairly and lawfully.”<sup>72</sup> Generally speaking, this is interpreted to mean either that individuals must consent to the collection and use of their information or that a piece of legislation must authorize personal data processing, specifying the public reasons that necessitate personal data processing. The Convention restricts the amount and type of personal information that may be collected: it must be gathered for “specific and legitimate purposes,”<sup>73</sup> and it must be “adequate, relevant and not excessive in relation to the purposes for which they are stored.”<sup>74</sup> Certain categories of personal information, if collected, must be treated with special care: “Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.”<sup>75</sup>

Moving past collection to the storage of information, data-protection actors must guarantee that personal data is “accurate and, where necessary, kept up to date.”<sup>76</sup> Safeguards must be put into place to protect the data from theft and other forms of security breaches: “Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorized destruction or accidental loss as well as against unauthorized access, alteration or dissemination.”<sup>77</sup>

As for use and dissemination, personal data may be used only for those purposes originally contemplated and only by those organizations for whom the data was originally intended.<sup>78</sup> It may be put to other uses and shared with other organizations only if doing so is necessary to fulfill the original purposes of data collection.<sup>79</sup> Last, the time during which per-

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ChercheSig.asp?NT=108&CM=1&DF=&CL=ENG (last visited May 10, 2008) (listing member states that have ratified the Convention).

71. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *supra* note 69, art. 3 (“The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors.”).

72. *Id.* art. 5(a).

73. *Id.* art. 5(b).

74. *Id.* art. 5(c).

75. *Id.* art. 6.

76. *Id.* art. 5(d).

77. *Id.* art. 7.

78. *Id.* art. 5 (“Personal data undergoing automatic processing shall be: stored for specified and legitimate purposes and not used in a way incompatible with those purposes . . .”).

79. *Id.*

sonal information may be retained is limited: personal information should be “preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.”<sup>80</sup>

The Convention also pays some attention to remedies.<sup>81</sup> It provides that individuals should have a right of access to their personal information.<sup>82</sup> This right guarantees that individuals will know what information about them is held and by which institutions. Moreover, once individuals have obtained access to their information, they have an opportunity to correct any incorrect information.<sup>83</sup> Finally, individuals have a right to demand that unlawfully processed information—say, information retained for longer than necessary—be deleted.<sup>84</sup>

The basic theory behind these rules is the less personal data processing, the better. The objectionable nature of personal data processing can only be comprehended in light of the fundamental rights origins of data privacy. Each time information about an individual is collected, personal autonomy is put at risk. Even though liberal societies disagree as to what is private and what is public, they all acknowledge that, in certain spaces and over certain matters, individuals are entitled to privacy.<sup>85</sup> If they so choose, individuals are entitled to bar access by others to their private spheres.<sup>86</sup> This entitlement stems from the duty of respect for others. Although certain pieces of personal information might appear far removed from this private sphere of control and autonomy, once such information is combined, manipulated, and disseminated, it might very well be revealing of the private sphere.

Of course, there are other rationales for data privacy. Personal information in the hands of powerful actors can be used for illiberal ends like the suppression of political dissent and discrimination based on religion, race, or ethnic origins.<sup>87</sup> Incorrect personal information can lead to all sorts of disastrous consequences for the individuals involved.<sup>88</sup> They might be unfairly detained or wrongly denied a welfare benefit.<sup>89</sup> Further, if personal information is stolen, individuals can be robbed of their assets

80. *Id.* art. 5(e).

81. *Id.* arts. 10, 17.

82. *Id.* arts. 8(a)–8(c).

83. *Id.* art. 8(c).

84. *Id.*

85. See AVISHAI MARGALIT, *THE DECENT SOCIETY* 202–04 (Naomi Goldblum trans., 1996); Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in *PRIVACY* 1, 1–3 (J. Roland Pennock & John W. Chapman eds., 1971).

86. See MARGALIT, *supra* note 85, at 204; Benn, *supra* note 85, at 3–4.

87. See NANCY CHANG, *SILENCING POLITICAL DISSENT* 94–134 (2002); LEWIS P. LAPHAM, *GAG RULE: ON THE SUPPRESSION OF DISSENT AND THE STIFLING OF DEMOCRACY* 55–67 (2004); Reg Whitaker, *After 9/11: A Surveillance State?*, in *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* 52, 54–58 (Cynthia Brown ed., 2003).

88. See Francesca Bignami, *Towards a Right to Privacy in Transnational Intelligence Networks*, 28 *MICH. J. INT'L L.* 663, 667–69 (2007) [hereinafter Bignami, *Towards a Right to Privacy*].

89. *Id.* at 668.

or fraudulently charged with onerous debts.<sup>90</sup> Yet, at the root of data privacy is the principle of autonomy. Even in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected.

Data-protection rules and the fundamental right to privacy are not only related in political theory but also in legal doctrine. Most of the rules reviewed earlier can be conceived as guidance for the proportionality investigation required under fundamental rights law. Since every instance in which personal data is collected constitutes an intrusion into private life, personal data must be collected and stored for specific and legitimate purposes and may not be used in a way incompatible with those purposes.<sup>91</sup> To ensure that personal data processing can accomplish the government's purpose—as is required under proportionality—all such data must be “adequate” and “relevant” to that purpose.<sup>92</sup> Likewise, such data must be “accurate and, where necessary, kept up to date.”<sup>93</sup>

Not only must data processing be *able* to achieve the government purpose, but it must be *necessary* to achieve that purpose.<sup>94</sup> As such, there is a requirement that the amount of data processed and the period during which it is stored be no more than necessary to accomplish the purpose.<sup>95</sup> Because the processing of certain types of personal data—revealing racial origin, political opinions, religious or other beliefs; concerning health or sexual life; or relating to criminal convictions—constitutes a particularly grave interference with privacy, special precautions must be taken.<sup>96</sup> Finally, as a special safeguard for the privacy right, individuals should have the right to check their personal data to ensure that it is both accurate and processed in accordance with the law. Most of these limitations on data collection and processing can be conceived as less rights-burdensome means of accomplishing the same government purpose. Each time a personal data-processing system is put into place, it must contain safeguards and restrictions that ensure that the privacy interest in personal data is compromised as little as possible. Last, the Convention permits exceptions in certain classes of cases, but only if the resulting burden on the privacy right is proportionate to the aim being pursued by permitting the exception.<sup>97</sup>

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90. See Michael W. Perl, *It's Not Always About the Money: Why the State Identity Theft Laws Fail to Adequately Address Criminal Record Identity Theft*, 94 J. CRIM. L. & CRIMINOLOGY 169, 169–81 (2003); Holly W. Towle, *Identity Theft: Myths, Methods, and New Law*, 30 RUTGERS COMPUTER & TECH. L.J. 237, 237–51 (2004).

91. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *supra* note 69, art. 5(b).

92. *Id.* art. 5(c).

93. *Id.* art. 5(d).

94. *Id.* arts. 5(b)–(c), 5(e).

95. *Id.* art. 5(c), 5(e).

96. *Id.* art. 6.

97. *Id.* art. 9.

## B. The European Union

### 1. *The Charter of Fundamental Rights*

Fundamental rights have long been part of the legal and political discourse of the European Union.<sup>98</sup> Until recently, however, such rights were imported into the EU legal order from national constitutions and the European Convention on Human Rights. As the Court of Justice has never tired of repeating,

It must also be stated that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.<sup>99</sup>

In 2000, however, the European Union finally obtained its own statement of fundamental rights with the Charter of Fundamental Rights.<sup>100</sup> The Charter includes a number of rights that reflect the circumstances of modern-day society.<sup>101</sup> The right to privacy is one of them.<sup>102</sup> The Charter dedicates two articles to privacy. The first, Article 7, copies this language from the European Convention on Human Rights: "Everyone has the right to respect for his or her private and family life, home and communications."<sup>103</sup> The second, however, innovates by specifically guaranteeing privacy in the age of electronic technology and the worldwide web:

#### Article 8— Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.<sup>104</sup>

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98. Joint Declaration of the European Parliament, Council, and Commission of April 5, 1977, 1977 O.J. (C 103) 1, 1 ("1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms. 2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.").

99. Case C-305/05, *Ordre des barreaux francophones et germanophone v. Conseil des Ministres*, 3 C.M.L.R. 28 (2007).

100. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1, 8.

101. See, e.g., *id.* art. 14 (right to education).

102. See *id.* arts. 7-8.

103. *Id.* art. 7.

104. *Id.* art. 8.

Much of the substance of this right of personal data protection should be familiar from the earlier discussion of the Council of Europe Convention on Automatic Processing of Personal Data.<sup>105</sup> The requirement of an independent authority is also familiar to data-protection advocates.<sup>106</sup> Independent authorities, established to oversee compliance with data-protection rules, have been a fixture of national data-protection schemes since the early 1970s.<sup>107</sup> By the mid-1990s, consensus on the desirability of an independent authority had emerged at the European level, first in the EU Directive discussed below and then in a special protocol to the Convention on Automatic Processing of Personal Data.<sup>108</sup>

## 2. *The Data Protection Directive*

In 1995, the Data Protection Directive (the Directive) was adopted by the European Union.<sup>109</sup> Today, all Member States have implementation legislation in place.<sup>110</sup> The Directive builds on the Convention on Automatic Processing of Personal Data in a number of respects. Although the Directive only sets down rules for activities that come under the market-oriented First Pillar, those rules are far more detailed than those contained in the Convention on Automatic Processing of Personal Data.<sup>111</sup> The Directive begins with a restatement of the Convention's core provisions on lawfulness, specific purposes, necessity, accuracy, and limited data retention.<sup>112</sup> Like the Convention, the Directive recognizes certain categories of personal information that should receive special protection,<sup>113</sup> gives individuals a right of access to their personal information,<sup>114</sup> and imposes a duty to adopt security measures to protect personal data.<sup>115</sup> These provisions, however, are far more detailed and onerous than the spare principles

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105. See generally Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *supra* note 69.

106. See, e.g., COLIN J. BENNETT, REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES 164-80 (1992).

107. See *id.*

108. See Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Regarding Supervisory Authorities and Transborder Data Flows, Nov. 8, 2001, Europ. T.S. No. 181.

109. Eur. Parl. & Council Directive 95/46, On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC), available at [http://ec.europa.eu/justice\\_home/fsj/privacy/law/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/law/index_en.htm) (follow 'pdf version' Part 1 & Part 2) [hereinafter 1995 Data Protection Directive].

110. For a list of member countries and the status of implementation of the 1995 Directive, see European Commission, Status of Implementation of Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data, [http://ec.europa.eu/justice\\_home/fsj/privacy/law/implementation\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/law/implementation_en.htm) (last visited Jan. 8, 2008).

111. Compare 1995 Data Protection Directive, *supra* note 109, with Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *supra* note 69.

112. 1995 Data Protection Directive, *supra* note 109, art. 6.

113. *Id.* art. 8.

114. *Id.* art. 12.

115. *Id.* art. 17.



set down in the Convention.<sup>116</sup> The Directive also elaborates on lawfulness by setting out those circumstances under which collection and use of personal data is permitted.<sup>117</sup>

The proportionality principle, familiar from the Council of Europe context, appears throughout the Directive. Government actors and private firms that seek to collect and process personal information must demonstrate that their operations satisfy the proportionality principle—that the burden imposed on the right to personal data protection is proportionate to the aim being pursued through their data-processing operations.<sup>118</sup> Any exceptions to the data-protection guarantees contained in the Directive must be proportionate to the aims being pursued in taking advantage of the exception.<sup>119</sup> To the extent that other rights—in particular freedom of expression—interfere with the right to personal data protection, that interference must be proportional.<sup>120</sup>

The Directive creates three new sets of rights and duties with respect to the Convention. First, at the time that personal information is collected or transmitted to third parties, individuals must be informed of the identity of the data processor, the purposes of the data processing, and a number of other aspects of the data-processing operation.<sup>121</sup> Second, in a provision drawn directly from French data-protection law, individuals have the right to object to automatic data processing with potentially adverse effects for that individual.<sup>122</sup> Thus, for instance, an individual denied credit by a financial institution based entirely on a computerized review of that individual's application may request that the application be reviewed by an employee of the bank. Third, the Directive prohibits the transfer of personal data to third countries unless those countries' laws adequately protect data privacy or one of a number of other privacy-protecting criteria are met.<sup>123</sup>

Perhaps most importantly, the Directive includes the enforcement apparatus that the Convention lacks. It requires that all Member States establish an independent data-protection authority.<sup>124</sup> These authorities must have the powers necessary to oversee and enforce compliance with

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116. For the sparer provisions of the Personal Data Convention, see Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, *supra* note 69, art. 6 (special categories of data) ("Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.") and art. 4 (duties of the parties) ("1. Each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter. 2. These measures shall be taken at the latest at the time of entry into force of this convention in respect of that Party.").

117. 1995 Data Protection Directive, *supra* note 109, art. 7.

118. *Id.* art. 7(f).

119. *Id.* arts. 11–13, 26.

120. *Id.* arts. 9, 13.

121. *Id.* arts. 10–11.

122. *Id.* art. 15.

123. *Id.* arts. 25–26.

124. *Id.* art. 28.

data-protection law.<sup>125</sup> The Directive anticipates that, under certain circumstances, firms and government agencies that process personal data will be required to notify the data-protection authority of their operations and, occasionally, obtain prior authorization.<sup>126</sup> The Directive also requires that national data-protection authorities have the power to inspect data users in order to detect data-protection violations.<sup>127</sup> Data-protection authorities must have remedial powers, such as the power to prohibit data-processing operations that violate the rules.<sup>128</sup> Additionally, they must have the power to sanction those firms and government agencies that break the rules.<sup>129</sup>

On the European, as opposed to national, level, two separate committees enforce the Directive.<sup>130</sup> One committee is responsible for regulating third-country transfers in line with privacy principles.<sup>131</sup> The other—known as the Article 29 Working Party—has broad-ranging jurisdiction to promulgate opinions on most data-protection issues that arise under the Data Protection Directive.<sup>132</sup> Although the Working Party's opinions are not formally binding, they are generally followed by other EU institutions and national authorities and as a consequence, the Working Party's legal interpretations are treated as if they were binding by most regulated entities.<sup>133</sup> In addition to this regulatory apparatus, an EU-level data-protection authority has been established. This authority, the European Data Protection Supervisor, enforces data-protection rules against EU institutions.<sup>134</sup>

### 3. *Additional EU Data Protection Legislation*

The Directive is the European Union's most comprehensive piece of data protection legislation. It applies, however, only to activities that fall under the First Pillar, namely market-based activities.<sup>135</sup> A separate set of data-protection instruments cover cooperation on immigration and cooperation on criminal justice under the Third Pillar.<sup>136</sup> Because their essentials

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125. *Id.*

126. *Id.* arts. 18–20.

127. *Id.* art. 28.

128. *Id.*

129. *Id.* arts. 24, 28.

130. CHRISTOPHER KUNER, *EUROPEAN DATA PRIVACY LAW AND ONLINE BUSINESS* 9–12 (2003).

131. 1995 Data Protection Directive, *supra* note 109, art. 26.

132. *See id.* art. 30.

133. KUNER, *supra* note 130, at 9–10.

134. *See generally* *Proposal for a Decision of the Eur. Parl., of the Council and of the Commission on the Regulations and General Conditions for the Performance of the Duties of the European Data Protection Supervisor*, COM (2001) 411 final (July 21, 2001).

135. Comm. on Citizens' Freedoms & Rights, Justice & Home Affairs, *Report on the First Report on the Implementation of the Data Protection Directive (95/46/EC)*, at 13, COM (2003) 265 final (Feb. 24, 2004).

136. *See generally* Peter J. Hustinx, *Personal Data Protection Yesterday, Today, Tomorrow*, WARSAW, May 12, 2006, at 132, available at [http://www.edps.europa.eu/EDP-SWEB/webdav/shared/Documents/EDPS/Publications/Speeches/2006/06-05-12\\_Art\\_third-pillar\\_EN.pdf](http://www.edps.europa.eu/EDP-SWEB/webdav/shared/Documents/EDPS/Publications/Speeches/2006/06-05-12_Art_third-pillar_EN.pdf).

largely replicate the terms of the Convention and the Directive, only the briefest of overviews is necessary here.

To effectively cooperate on immigration and criminal justice, a number of EU databases have been established.<sup>137</sup> These databases are covered by separate sets of data protection provisions. National authorities that exchange immigration and crime-related information through the Schengen Information System are bound by the data-protection guarantees in the Schengen Convention.<sup>138</sup> The terms of the Europol Convention apply to the exchange of crime-related information through the Europol Information System.<sup>139</sup> When national prosecutors and courts exchange information through the Eurojust Information System, they are bound by the data-protection provisions of the decision establishing that information system.<sup>140</sup> The data-protection provisions of the basic regulation creating the Customs Information System apply when national customs officers exchange information related to smuggling and other offenses through that computer system.<sup>141</sup> Currently under negotiation is a Third-Pillar Framework Decision that will replace this complicated, largely overlapping, set of laws with one single legislative scheme.<sup>142</sup> The Framework Decision will also significantly extend the coverage of EU data-protection guarantees: when national police, prosecutors, and the courts cooperate to combat crime under the Third Pillar and, in the process, exchange personal information on criminal suspects, they will be bound by the terms of the Framework Decision.

Today, therefore, the only domain of European social life that is still untouched by EU data protection law is intelligence-gathering by national spy agencies. National spy agencies like Germany's Office for the Protection of the Constitution and Federal Intelligence Service generally do not come within the reach of EU law at all. These agencies have been expressly excluded from the ambit of the European Union's Third Pillar.<sup>143</sup> To the extent that spy agencies come within the jurisdiction of the European Union at all, they would have to be regulated under the Second Pillar. At present, there are no proposals to do so.

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137. See Bignami, *Towards a Right to Privacy*, *supra* note 88, at 666-67.

138. Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at Their Common Borders, tit. IV, Sept. 22, 2000, 2000 O.J. (L 239) 19.

139. Convention Based on Article K.3 of the Treaty of European Union, on the Establishment of a European Police Office, arts. 2-3, 1995 O.J. (C 316) 2.

140. Decision 2002/187/JHA of 28 February 2002 Setting Up Eurojust with a View to Reinforcing the Fight Against Serious Crime, art. 5, 2002 O.J. (L 63) 1, 3.

141. Council Regulation 515/97, On Mutual Assistance Between the Administrative Authorities of the Member States and Cooperation Between the Latter and the Commission to Ensure the Correct Application of the Law on Customs and Agricultural Matters, art. 30, 1997 O.J. (L 82) 1.

142. Note from Presidency to Delegations on Proposal for a Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters (Mar. 13, 2007).

143. The Third Pillar applies to "Police and Judicial Cooperation on Criminal Matters" and, thus, not to spies. CRAIG & DE BURCA, *supra* note 49, at 39-41.

### III. The European Constitutional Culture of Privacy

In a series of cases, the European Court of Human Rights and the European Court of Justice have grappled with the meaning of these privacy provisions.<sup>144</sup> They have determined the scope of the private sphere protected by European law and the nature of the safeguards afforded under European law. The courts have also decided under which circumstances it might be permissible to intrude upon privacy to further the legitimate purposes of other members of society. The right to speak, to be safe, and to transact in the marketplace can all come into conflict with the right to privacy. These moral and legal quandaries have become especially difficult with the massive diffusion of new information technologies. Information technologies hold extraordinary promise for human creativity and social communication yet they also pose an immense threat to privacy. Put simply, with the widespread availability of new information technologies, the temptation to spy on one's neighbors or one's citizens is extraordinary.

This section examines how the courts have addressed these issues in the unique context of Europe's plural legal order. The focus is on two cases involving the balance between the right to privacy and the right to speech. The first, decided by the European Court of Justice, considered the interference with the right to privacy caused by a personal webpage, available throughout the world through the Internet.<sup>145</sup> Although the Court recognized the right to privacy and the right to speech as fundamental components of the European constitutional order, it left the task of balancing the two values to the national court and the national constitutional order.<sup>146</sup> The second case, decided by the European Court of Human Rights, reached a very different conclusion. That case involved the interference with a celebrity's right to privacy caused by the publication of paparazzi photographs in a weekly magazine.<sup>147</sup> In its judgment, the Court not only recognized the importance of the right to expression and the right to privacy in the European legal order but also decided in favor of the celebrity's right to privacy.<sup>148</sup> The reasoning in these two cases both demonstrates the tension between European constitutionalism and longstanding national legal orders and reveals the jurisprudential techniques developed by Europe's courts to accommodate national diversity.

#### A. Criminal Proceedings Against Bodil Lindqvist

The European Court of Justice had occasion to consider at length the Data Protection Directive in *Criminal Proceedings Against Bodil Lindqvist*.<sup>149</sup>

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144. In the European Court of Human Rights, see *Von Hannover v. Germany*, App. No. 59320/00, 40 Eur. H.R. Rep. 1 (2005); *Peck v. United Kingdom*, 2003-I Eur. Ct. H.R. 123. In the European Court of Justice, see Case C-101/01, *Criminal Proceedings Against Lindqvist*, 2003 E.C.R. I-12971; Case T-194/04, *Bavarian Lager Co. v. Comm'n*, 1999 E.C.R. II-3217.

145. *Lindqvist*, 2003 E.C.R. at I-13006.

146. *Id.* at I-13025.

147. *Von Hannover*, 40 Eur. H.R. Rep. at 5.

148. *Id.* at 28.

149. *Lindqvist*, 2003 E.C.R. at I-12971.

Lindqvist volunteered as a catechist in her local parish in Sweden.<sup>150</sup> At the same time, she took a computer class in which she learned how to create websites.<sup>151</sup> She then created her own personal webpage, on which she posted information designed to assist her fellow parishioners preparing for catechism.<sup>152</sup> The website also included information on herself and eighteen colleagues from her parish, all identified by name.<sup>153</sup> The information on her colleagues covered a variety of topics: their telephone numbers, their jobs and hobbies, their family circumstances, and in the case of one colleague, the fact that she had injured her foot and, therefore, was on half-time medical leave from her job.<sup>154</sup> Lindqvist posted this information without first obtaining the consent of her fellow catechists, although when she learned that some of them objected to the dissemination of their information, she promptly removed it from the website.<sup>155</sup>

Under the Swedish law implementing the Directive, all personal data processors had to register their operations with the Swedish data-protection authority.<sup>156</sup> They also had to obtain authorization from the data-protection authority if they planned to process sensitive data, such as health information, or to transfer personal data to a country outside the European Union.<sup>157</sup> Lindqvist was unaware of this requirement when she first created her website but subsequently was informed of the requirement by an acquaintance.<sup>158</sup> She then paid a visit to her local police station to inquire about her legal duties, at which point the police referred the matter to the public prosecutor.<sup>159</sup> Lindqvist was prosecuted and convicted for various breaches of the Swedish law.<sup>160</sup> Her punishment was a criminal fine of 4000 SEK.<sup>161</sup>

On appeal, the Swedish court referred a number of questions regarding the proper interpretation of the Directive—and therefore also the Swedish implementing law—to the European Court of Justice.<sup>162</sup> The Court easily found that uploading personal data onto Lindqvist's website consti-

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150. *Id.* at I-13002.

151. E-mail from Xavier Lewis, Member of the European Comm'n Legal Serv., to Francesca Bignami, Professor of Law, Duke University Sch. of Law (Feb. 18, 2008, 10:51 EST) (on file with author) [hereinafter Lewis E-mail].

152. *Id.*

153. *Id.*

154. *Lindqvist*, 2003 E.C.R. at I-13002.

155. *Id.* at I-13003.

156. See 36 § Personuppgiftslag (SFS 1998:204) (Swed.).

157. See 13 § Personuppgiftslag (SFS 1998:204) (Swed.) (prohibiting the processing of sensitive personal data); 33 § Personuppgiftslag (SFS 1998:204) (Swed.) (prohibiting the transfer of processed personal data to countries that lack adequate protections for personal data); 35 § Personuppgiftslag (SFS 1998:204) (Swed.) (authorizing the government-designated authority to grant exemptions from prohibitions on transfer of personal data to certain states).

158. See Lewis E-mail, *supra* note 151.

159. *Id.*

160. Case C-101/01, Criminal Proceedings Against Lindqvist, 2003 E.C.R. I-12971, I-13003.

161. *Id.* at I-13004.

162. *Id.* at I-13004-I-13006.

tuted “personal data processing” covered by the Directive.<sup>163</sup> With a bit more difficulty, the Court determined that Lindqvist’s website did not qualify for any of the exceptions to the personal data processing covered by the Directive.<sup>164</sup> Lindqvist invoked two exceptions allowed under the Directive: one for activities that fall “outside the scope of Community law” and one for data processing “by a natural person in the course of a purely personal or household activity.”<sup>165</sup> The Court decided that her webpage did not qualify for the latter exception because it was accessible to the entire universe of web users; it was not confined to the home or to the personal realm.<sup>166</sup> The Court went on to interpret the exception for activities “outside the scope of Community law” as limited to activities falling under the Second and Third Pillars.<sup>167</sup> The Court therefore held that this exception was also unavailable to her.<sup>168</sup> Even though Lindqvist’s website did not constitute a classic exercise of one of the four market freedoms—it was religious and charitable in nature—it also did not constitute an exercise of Second or Third Pillar activities.<sup>169</sup> As a result, the Swedish registration system for personal data applied to personal websites, not only to web operators like large commercial vendors and internet providers.

It is worthwhile to dwell for a moment on the extraordinary reach of the Data Protection Directive. In narrowly interpreting the exception for activities falling outside of Community law, the Court adopted an expansive reading of the Directive. The provision at issue reads:

This Directive shall not apply to the processing of personal data . . . in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union [Second and Third Pillars] and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law . . . .<sup>170</sup>

In giving meaning to the phrase “outside the scope of Community law,” the Court relied heavily on the reference to the Second and Third Pillars that immediately followed, as well as on the core subject areas of the Second and Third Pillar listed thereafter.<sup>171</sup> It found, using the canon of construction of *ejusdem generis*, that only activities of the same nature as public security, defense, state security, and criminal law were to be considered “outside the scope of Community law.”<sup>172</sup> In doing so, the Court

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163. See *id.* at I-13008.

164. See *id.* at I-13014.

165. *Id.* at I-130012-13.

166. *Id.* at I-13014.

167. *Id.* at I-13013.

168. *Id.*

169. *Id.*

170. 1995 Data Protection Directive, *supra* note 109, at 39.

171. *Lindqvist*, 2003 E.C.R. at I-130012-13.

172. See *id.* *Ejusdem generis* dictates that “when a word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.” BLACK’S LAW DICTIONARY 556 (8th ed. 2004).

departed from the opinion of the Advocate General, who had advised that activities should be considered within the scope of Community law only if they entailed the exercise of one of the four market freedoms or if they were regulated under a specific Community law that was enacted under one of the Community's competences.<sup>173</sup> The Court's interpretation also departed from the plain meaning of the Directive; the use of the phrase "such as" suggested that the Second and Third Pillars and the types of operations typical of those pillars should be taken as an illustrative, not exhaustive, list of activities falling outside Community law. It was clear that the Court's interpretation was driven not so much by the text as by the specter of future litigation. If the Court were to hold otherwise and find that the Directive applied to only market-related activities, how would future courts distinguish between market-related and other activities?

Setting aside the question of whether this interpretation was right, it accentuates the tension between a European law drafted in the early 1990s, before information technology had become a pervasive feature of daily life for the vast majority of citizens, and the application of that same law today. The drafters of the Directive could not have anticipated the incredible democratization of information technologies that has occurred over the past ten years. Because of this democratization, privacy principles today are relevant not only to big economic and government operators with the capacity to gather large amounts of personal information, such as banks, telecommunications providers, and government welfare agencies. With digital technology and the Internet, anyone can gather and disseminate vast quantities of personal information, and therefore anyone can violate the right to data privacy. Even though privacy principles should certainly guide individuals like Lindqvist who benefit from the tremendous potential of information technologies, it is doubtful that the same regulatory scheme that applies to large commercial and government operators is also appropriate for individual citizens.

The Court did, however, limit the Directive's scope in one way. It found that the mere act of making personal data available to individuals in third countries through the World Wide Web did not constitute a transfer of that personal data to third countries.<sup>174</sup> Although the Directive nowhere defines the term "transfer," the Court found that this interpretation was necessary to prevent a specific set of duties—applicable only to third-country transfers—from becoming a general set of duties, applicable to all operations using the World Wide Web.<sup>175</sup> In the Swedish case, this interpretation relieved both individuals like Lindqvist of the duty to obtain regulatory authorization before posting personal information on the internet and the Swedish data-protection authority of the burden of reviewing and approving applications from thousands of individuals like Lindqvist.

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173. See *Lindqvist*, 2003 E.C.R. at I-13011.

174. See *id.* at I-13020.

175. See *id.*

Lindqvist's challenge to her prosecution based on her right to freedom of expression raises a number of issues related to the theme of constitutional patriotism. She claimed that both the requirements of the Directive as well as the application of the Directive in her specific case breached the right to freedom of expression.<sup>176</sup> Under European human rights law, the freedom of expression analysis is identical to the three-step privacy analysis reviewed earlier: any interference with the right must be authorized by law, must seek to accomplish a legitimate purpose, and must be proportionate to the burden placed on the right.<sup>177</sup> In Lindqvist's view, the terms of the Directive were not precise enough to satisfy the fundamental-rights requirement that any interference with the right to expression be based on a law specific enough to place citizens on notice of the extent and nature of the government interference.<sup>178</sup> She also argued that the Directive failed to satisfy the proportionality requirement because the Directive's various privacy safeguards disproportionately burdened her right to expression.<sup>179</sup> Furthermore, according to Lindqvist, even if the Directive as a whole were to be found lawful, in her particular case the burden on her freedom of expression should be considered disproportionate. In her view, the interference with her colleagues' right to privacy was minimal, given that most of the personal information on her webpage was either already publicly available or trivial.<sup>180</sup> Under such circumstances, her right to free expression should prevail, not the other way around.

The Court rejected Lindqvist's freedom-of-expression challenge but, at the same time, directed the Swedish court to take into account Lindqvist's right to freedom of expression.<sup>181</sup> The Court acknowledged that some of the Directive's terms were vague and allowed for considerable choice at the national level when the Directive was implemented into national law.<sup>182</sup> The Court dismissed these concerns, however, as intrinsic to the policy area; a far-reaching regulatory scheme seeking to cover data protection throughout the economy was necessarily broadly drafted.<sup>183</sup> In addition, the Court found that the Directive took adequate account of freedom of expression by requiring that in the application of the Directive, the right to freedom of expression should always be balanced against the right to data protection as well as the other rights and interests advanced in the Directive.<sup>184</sup> The Court concluded by directing the Swedish court to conduct the balancing exercise:

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176. *Id.* at I-13021.

177. *See* OVEY & WHITE, *supra* note 46, at 317-20.

178. *See* Lindqvist, 2003 E.C.R. at I-13021. More particularly, she argued that the definition of "processing of personal data wholly or partly by automatic means" did not fulfill the criteria of predictability and accuracy. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.* at I-13023-24.

183. *See id.* at I-13024 ("It is true that, in many respects, the Member States have a margin for maneuver in implementing Directive 95/46.").

184. *Id.* at I-13023-24.



1. Thus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved.
2. In that context, fundamental rights have a particular importance, as demonstrated by the case in the main proceedings, in which, in essence, Mrs. Lindqvist's freedom of expression in her work preparing people for Communion and her freedom to carry out activities contributing to religious life have to be weighed against the protection of the private life of the individuals about whom Mrs. Lindqvist has placed data on her internet site.
3. Consequently, it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as *inter alia* the principle of proportionality.<sup>185</sup>

By sending the fundamental rights question back to the Swedish court, the Court of Justice both avoided a difficult issue and allowed for considerable national discretion. The fundamental-rights balance between privacy and speech is by no means a precise science and by holding the Swedish court responsible for the balancing, the Court acknowledged that the outcome would be distinctive to Swedish law. In other words, as a member of the European constitutional order, the Swedish court was required to consider both privacy and freedom of expression, but the accommodation of these two fundamental values was to be distinctive to Sweden's constitutional order.<sup>186</sup> Of course, in the future, the Court of Justice might choose to give a European answer to the privacy-speech conundrum. For the time being, however, the Court has decided that the better site for the resolution of such thorny issues is national constitutional law.

This constitutional settlement is reminiscent of many other areas of Community law. In deciding on the public policy exceptions to the fundamental market freedoms, the Court of Justice has always been reluctant to interfere with national legal orders in those cases in which the exception cannot be reduced to science but rather appears to have longstanding moral or religious roots. In a series of cases starting in the mid-1980s, the Court of Justice was called upon by the British courts to decide whether local rules prohibiting commerce on Sundays were compatible with the duty to allow for free movement of goods under the EC Treaty.<sup>187</sup> In *Torfaen Borough Council v. B&Q PLC*, the Court found that such rules could, in theory, reduce trade in goods among Member States and, there-

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185. *Id.* at I-13024.

186. *Id.* (noting that member states must endeavor "not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law").

187. See Case C-145/88, *Torfaen Borough Council v. B&Q PLC.*, 1989 E.C.R. 3851.

fore, to use the doctrinal language of European law, be “caught” by Article 28 of the EC Treaty.<sup>188</sup> The Court also found, however, that the prohibition on Sunday trading might be justified as a legitimate social policy.<sup>189</sup> This social policy has such obvious Christian origins that there was no need for the Court to be explicit; Sundays, in the Christian tradition, should be devoted to God, not to the pursuit of worldly, commercial activities. But rather than conduct the required proportionality analysis, the Court sent the question back to the British court.<sup>190</sup> Thus, the Court recognized that the British court was best placed to address the inordinately difficult challenge of reconciling religion and the life habits that accompany religion with the demands of contemporary economic life and membership in a free trade area.<sup>191</sup> In essence, the Court acknowledged that this was a matter of the British—not European—constitutional order and that only the British court could conceivably resolve the dilemma.

In fact, not even the British courts were up to the challenge. After a number of conflicting rulings in the British lower courts, the matter went to the House of Lords.<sup>192</sup> The House of Lords, rather than decide the issue, referred another question to the Court of Justice: What criteria should it use to decide the proportionality of regulatory restrictions on Sunday trading?<sup>193</sup> Only reluctantly, therefore, did the Court of Justice settle this thorny problem. And rather than answer the question directly and elaborate on the appropriate proportionality criteria, the Court simply declared that the Sunday trading rules were proportionate.<sup>194</sup> By giving a preliminary ruling in the sparest of terms, the European law on the correct compromise between old mores and new commerce was left as vague as possible.

Another illustration of the Court’s deferential approach to national constitutionalism is *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*.<sup>195</sup> The contending values in the case were free movement of services and human dignity. Omega

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188. See *id.* at 3889. The Court notoriously reversed itself on this point in C-267/91, *Criminal Proceedings Against Keck & Mithouard*, 1993 E.C.R. I-6097, I-6131. Please note that C-267/91 is a combination of the two original cases: C-267/91 and C-268/91. See *id.* at Issue 1.

189. See *Torfaen Borough Council*, 1989 E.C.R. at 3889.

190. See *id.* As with the right to privacy, before a public policy reason can trump the right to free movement of goods, the proportionality principle must be satisfied: the restriction on the free movement of goods must be necessary for satisfying the public policy end and the burden on free movement of goods must be proportionate to the end being pursued. See *id.* at 3888.

191. See *id.*

192. See *Council of the City of Stoke-on-Trent & Norwich City Council v. B&Q PLC*, 1992 E.C.R. I-6635, I-6656 (discussing different possible interpretations arising out of three British rulings).

193. See *id.* at I-6656–57.

194. *Id.* at I-6659.

195. Case C-36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609.

owned and operated a laserdrome in Germany.<sup>196</sup> Although Omega was a German company, it operated under a franchise agreement with a British firm, and therefore it was covered by the free-movement-of-services provisions of the Treaty Establishing the European Community.<sup>197</sup> Soon after Omega opened its doors to the public, it was ordered by the local authorities to cease part of its operations—games involving shooting laser beams at human targets.<sup>198</sup> The justification for the order was the offense to human dignity perpetrated by such laser games.<sup>199</sup> According to the German authorities, “[T]he games which took place in Omega’s establishment constituted a danger to public order, since the acts of simulated homicide and the trivialization of violence thereby engendered were contrary to fundamental values prevailing in public opinion.”<sup>200</sup>

Omega appealed to the German administrative courts.<sup>201</sup> The courts found that, indeed, such games constituted an offense to human dignity and therefore had been banned legitimately.<sup>202</sup> However, the highest administrative court referred to the Court of Justice the question of the compatibility of the German right to human dignity with the European guarantee of free movement of services: Could Germany take advantage of the public policy exception to the principle of free movement of services based on a right that, at least in the specifics, was not common to all Member States, i.e., a right to human dignity that included a prohibition on laser games?<sup>203</sup>

The Court of Justice answered in the affirmative.<sup>204</sup> It found that respect for human dignity was as much a part of European law as it was of German law and, therefore, the protection of human dignity qualified as a legitimate reason for restricting free movement.<sup>205</sup> The means or “system of protection” in favor of human dignity in one Member State did not have to mirror the system of protection in other Member States for it to be considered legitimate.<sup>206</sup> Of course, consistent with the Court’s earlier case law, a rights-based restriction on free movement, like any other restriction, had to satisfy the proportionality test.<sup>207</sup> The Court of Justice then reviewed the German court’s holding and found that it had appropriately applied these European principles.<sup>208</sup>

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196. *Id.* at I-9643 (noting that a laserdrome is a facility in which players using “sub-machine-gun-type laser targeting devices and sensory tags fixed either in the firing corridors or to jackets worn by players” competed against each other for amusement).

197. *See id.* at I-9643.

198. *Id.* at I-9644.

199. *Id.* at I-9645.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at I-9655.

205. *Id.* at I-9653.

206. *Id.* at I-9654.

207. *See id.* at I-9653.

208. *Id.* at I-9654.

Contrary to *Lindqvist* and *Torfaen Borough*, the Court of Justice in *Omega* did not accommodate national diversity by sending the task of balancing constitutional values back to the national court. Rather, the Court resorted to another judicial technique, reviewing the findings of the German authorities under the deferential standard of “margin of discretion.”<sup>209</sup> The Court explained this standard of review as follows: “[T]he specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.”<sup>210</sup> The Court scrupulously applied this standard to the facts of the case. In examining the rationale for the German ban and the proportionality of the ban, the Court deferred extensively to the reasons given by the local administrative authority and the referring court.<sup>211</sup> In reaching the conclusion that the ban was permissible, the Court refused to substitute its judgment for that of the German authorities.<sup>212</sup> Instead of concluding that the ban was justified, the Court found that the ban could not be regarded as “unjustifiably undermining the freedom to provide services.”<sup>213</sup> Although, on its face, this word choice might appear trivial, it is indeed important. It signifies that, under European law, the authority to decide the balance between the market and human dignity rests primarily with the German courts; the European Court of Justice may interfere only in those extreme cases in which that national authority appears to have been abused. It is for German courts to determine whether a rights-based restriction on the market is justified and for the European Court of Justice to guarantee that this national determination is not unjustified.

These cases demonstrate that on tough constitutional questions, like the balance between privacy and expression or between human dignity and market rights, the Court of Justice gives precedence to national constitutionalism. By sending constitutional questions back to national courts and employing the deferential review standard of margin of discretion, the Court avoids the pitfalls of constitutional patriotism. It affirms a set of principles common to the entire European Union yet also defers to national constitutional values. In other words, it tolerates constitutional diversity.

Another way to understand these judicial techniques of constitutional tolerance is by reference to the sociology of the European center. In cases like *Lindqvist* and *Omega*, the Court rightly recognizes that the public sphere of Europe is still too thin to provide an answer to most of the difficult questions of constitutional law. In the language of Rawls, in these areas, there are no terms of fair cooperation to which Europe’s gradually emerging society of citizens could agree.<sup>214</sup> To take the privacy example,

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209. *Id.* at I-9652.

210. *Id.*

211. *Id.* at I-9652, I-9654.

212. *Id.* at I-9654.

213. *Id.*

214. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

although European citizens might agree that individuals should be entitled to speak about others and at the same time, to lead part of their lives in private, the deeper question of how to resolve conflicting claims to speech and privacy has no answer. If the Court of Justice were to attempt to resolve the matter, it would be deciding entirely at random. Of course, courts like the Court of Justice contribute to making a constitutional culture, yet they do not do so in a social void. They do so in the context of a dense set of institutions and social practices that serve to enable collective life in a community. There is no objective indicator of the point at which the institutional and cultural fabric of a new society is thick enough that a court like the European Court of Justice can begin giving meaningful answers to constitutional questions like the privacy-speech balance. But if the Court prematurely attempts to resolve such questions, it risks, at best, irrelevance, at worst, delegitimation. At best, the Court's judgment will be obeyed but will be entirely marginal to future debates on that constitutional question. At worst, the lack of social foundation for the Court's judgment will justify disobedience in that case or in future cases.

B. *Von Hannover v. Germany* (Princess of Monaco)

Because of its history, the European Court of Human Rights has had many more opportunities than the European Court of Justice to address the right to privacy, as well as the inevitable conflicts that arise between the right to privacy and the right to free expression. In doing so, the ECtHR has been far less shy than the ECJ about reversing national decisions. It has shown considerably less deference toward national courts and has intervened actively in domestic decision-making, sometimes on the side of privacy, sometimes on the side of speech.

The ECtHR's doctrinal tools for negotiating the relationship between national and supranational constitutionalism are somewhat different from those of the ECJ. The system of jurisdiction established under the European Convention on Human Rights does not contemplate preliminary references.<sup>215</sup> Rather, individuals must exhaust their legal remedies at the national level, obtaining a final national judgment, before they may apply to the ECtHR for relief.<sup>216</sup> One consequence of this system of jurisdiction is that the ECtHR cannot send legal issues back to national courts for final resolution.<sup>217</sup> In its judgments, the ECtHR must decide once and for all whether there has been a breach of the Convention. The judicial dialogue made possible in the European Union by virtue of the preliminary reference system has no analogue in the European Convention on Human Rights.

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215. The ECJ has preliminary reference jurisdiction. See CRAIG & DE BURCA, *supra* note 49, at 432. The ECtHR does not have preliminary reference jurisdiction among its forms of jurisdiction. See OVEY & WHITE, *supra* note 46, at 8-11.

216. Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 35, May 11, 1994, Eur. T.S. No. 155 [hereinafter Protocol 11].

217. See *id.* art. 44 (noting that the ECtHR issues final judgments).

The ECtHR, however, employs a deference doctrine similar to the margin of discretion that was afforded to Germany in the *Omega* Case: Member States, in balancing fundamental rights against other fundamental rights or public interest objectives, benefit from a “margin of appreciation.”<sup>218</sup> The concept does not appear in the European Convention on Human Rights but rather is a creation of the ECtHR. It was first articulated by the ECtHR in the 1970s in a series of cases involving the public emergency derogation to human rights.<sup>219</sup> Later, the concept was extended to a number of other human-rights areas, including interferences with the right to privacy under Article 8 and with the right to free expression under Article 10.<sup>220</sup> The deference given to Member States under the doctrine of margin of appreciation can save an interference with a Convention right at two distinct phases of the legal analysis: (1) in assessing the importance of the public policy or competing individual right that serves as the government justification for the interference with the right and (2) in assessing the proportionality of the interference with the right.<sup>221</sup>

The rationale for affording Member States discretion in making a determination on fundamental rights is similar to the one explored earlier in the context of the ECJ: because national authorities are situated socially and culturally they are in a better position than the ECtHR to give specific effect to the highly abstract commitments of the Convention. As the ECtHR stated in an early case on freedom of expression,

[B]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of free expression and the conditions under which a State's interference with free expression is justified].<sup>222</sup>

Most commentators agree that as the ECtHR has matured as a court, it has become tougher on defending Member States and more reluctant to defer to them through the doctrine of margin of appreciation.<sup>223</sup> This is certainly evident in the domains of privacy and freedom of expression.<sup>224</sup>

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218. Case C-36/02, *Omega Spielhallen*, 2004 E.C.R. I-9609, I-9652. Indeed, on their face, the doctrines of margin of discretion and margin of appreciation are identical. The linguistic difference is an artifact of different English translations from the same French term of art “*marge d'appréciation*.” See generally James Sweeney, ‘Margin of Appreciation’ in the ECJ and ECHR, 34 *LEGAL ISSUES OF ECON. INTEGRATION* 27, 28–36 (2007) (comparing the ECJ's case law with the ECtHR's doctrine of margin of appreciation).

219. CAMERON, *supra* note 52, at 28; see HOWARD CHARLES YUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996).

220. See CAMERON, *supra* note 52, at 28–29.

221. See *id.* at 30.

222. *Handyside v. The United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976).

223. See YUROW, *supra* note 219, at 56; Sweeney, *supra* note 218, at 42.

224. In other areas, however, the movement away from the margin of appreciation is less clear. Indeed, according to some commentators, the ECtHR continues to rely heavily on the doctrine to decide a wide variety of cases. See Benvenisti, *supra* note 14, at 846; Carozza, *supra* note 15, at 57.

This reluctance to tolerate national constitutional diversity is dramatically at odds with the approach taken by the ECJ, analyzed in Part III.

The recent case of *Von Hannover v. Germany* (Princess of Monaco) illustrates the different approach taken by the ECtHR in resolving conflicting claims to privacy and freedom of expression.<sup>225</sup> At issue in the case were three separate German judgments, involving three different series of photographs of the Princess and her family.<sup>226</sup> These photographs, taken without her consent, were published in a number of different German weekly magazines.<sup>227</sup> At the time of publication of each series of photographs, the Princess of Monaco brought suit before the German courts to enjoin their publication. The litigation concerning the first series of photographs was the most exhaustive and gave rise to extensively reasoned opinions by both the Federal Court of Justice (the highest court for the system of civil and criminal justice) and the Federal Constitutional Court.<sup>228</sup> The subsequent litigation involving the two other series of photographs was decided based on this precedent and, therefore, from a legal-reasoning perspective, holds less interest.<sup>229</sup>

The first series of photographs captured the Princess in a variety of situations. She was shown with Vincent Lindon, a French actor and her boyfriend at the time, in a secluded restaurant courtyard.<sup>230</sup> She appeared together with her children in various public places, such as the market.<sup>231</sup> She was also shown alone, horseback riding and shopping.<sup>232</sup> Both the German court of first instance and the German court of appeals took the conventional view of privacy and held against the Princess.<sup>233</sup> They found that as an "absolute figure of contemporary history" (*eine absolute Person der Zeitgeschichte*), the Princess could not protest the publication of her photographs.<sup>234</sup> Because of their importance to contemporary debate, such figures could only claim a right to privacy when in the home, not when in public spaces.<sup>235</sup> The Federal Court of Justice was more sympathetic to the Princess. It found that a concept of privacy limited to the home, even in the case of public figures like the Princess, was too narrow.<sup>236</sup> Such figures should be able to prevent the public from prying even outside the home, in other spaces of "seclusion."<sup>237</sup> In the court's view, the restaurant courtyard in which the Princess was photographed eating with Vincent Lindon was precisely such a space of seclusion.<sup>238</sup> The

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225. *Von Hannover v. Germany*, App. No. 59320/00, 40 Eur. H.R. Rep. 1, 23 (2005).

226. *Id.* at 6-16.

227. *Id.* at 5-6.

228. *Id.* at 7-15.

229. *Id.* at 15-16.

230. *Id.* at 5.

231. *Id.* at 5-6.

232. *Id.* at 5.

233. *Id.* at 7.

234. *Id.*

235. *Id.*

236. *Id.* at 7-8.

237. *Id.*

238. *Id.*

court, therefore, enjoined the publication of the restaurant photographs but permitted publication of the remaining photographs because they involved entirely public places.<sup>239</sup>

That, however, was not the end of the matter. The Princess of Monaco filed a constitutional complaint with the Federal Constitutional Court.<sup>240</sup> In one respect, the court expanded her right to privacy. It found that children's privacy should receive special constitutional protection.<sup>241</sup> Children, the Federal Constitutional Court reasoned, were especially vulnerable to the autonomy harms caused by privacy violations because their personalities were still developing.<sup>242</sup> Unless a public figure like the Princess of Monaco intentionally took center stage at a public event with her children, the interest of the press and the public in knowing about the children must give way to the children's privacy.<sup>243</sup> The court therefore enjoined the publication of all those photographs in which the Princess's children appeared.<sup>244</sup> Remaining in the public eye were only those photographs in which she appeared horseback riding and shopping.<sup>245</sup>

Based on this reasoning, the German courts rejected two later lawsuits brought by the Princess, seeking to enjoin the publication of two other sets of photographs.<sup>246</sup> The first series of photographs showed the Princess enjoying different sports together with her husband, Prince Ernst August von Hannover.<sup>247</sup> The second showed her stumbling at the pool of a private country club.<sup>248</sup> Both series of photographs, according to the German courts, involved places fully visible to the public eye.<sup>249</sup> They neither objectively demonstrated an effort by the Princess to create a place of seclusion,<sup>250</sup> nor were they taken of her together with her children.<sup>251</sup> Therefore, before the German courts, the public interest in the photographs of the Princess prevailed.<sup>252</sup>

The Princess had better luck before the European Court of Human Rights. The Court found that the publication of all of the photographs at issue in the three German proceedings violated the Princess's right to private life.<sup>253</sup> The Court first elaborated on the value of the right to private life.<sup>254</sup> In doing so, it sought to identify, in abstract terms, the values underpinning the right to private life and in concrete terms, the circum-

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239. *Id.*

240. *Id.* at 8.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 15-16.

247. *Id.* at 6.

248. *Id.*

249. *Id.* at 16.

250. *See id.*

251. *See id.* at 6.

252. *Id.* at 16.

253. *Id.* at 28-29.

254. *Id.* at 23.



stances under which the Court would recognize the right.<sup>255</sup>

[P]rivate life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings . . . . There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life."<sup>256</sup>

How would the Court identify the zone that fell within the scope of "private life"? The Court said that it would consider "whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public."<sup>257</sup> Because the photographs showed the Princess in her daily life, not engaged in public functions, the Court found that the photographs belonged to her private life.<sup>258</sup>

The Court then turned to the competing right of freedom of expression. It emphasized the importance of free expression and the press to a democratic society: the press had a duty to impart "information and ideas on all matters of public interest."<sup>259</sup> Yet, at the same time, the Court underscored the duties and responsibilities of the press: "it must not overstep certain bounds, in particular in respect of the rights of others."<sup>260</sup>

The balance between the two rights, however, was struck in favor of the Princess and the right to privacy.<sup>261</sup> The Court reached this conclusion based on the low value that it attached to the speech involved in the case.<sup>262</sup> The Court employed an implicit hierarchy of speech.<sup>263</sup> At the bottom of this hierarchy, the Court placed the photographs of the Princess and declared them unworthy of protection, at least when in conflict with the right to privacy.<sup>264</sup> The Court drew three distinctions.<sup>265</sup> First, according to the Court, words were superior to images because words generally communicated ideas whereas images could convey very personal information.<sup>266</sup> Second, expression concerning politicians was considered

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255. *Id.* at 24.

256. *Id.* at 23.

257. *Id.* at 24.

258. *Id.*

259. *Id.* at 25.

260. *Id.*

261. *Id.* at 27.

262. *Id.* ("[T]he Court considers that the publication of the photos and articles in question . . . cannot be deemed to contribute to any debate of general interest to society . . . .").

263. *Id.* at 25 ("Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of 'ideas,' but of images containing very personal or even intimate 'information' about an individual.").

264. *Id.*

265. *Id.* at 25-27.

266. *Id.* at 25 ("[P]hotographs appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.").

more valuable than expression concerning private individuals.<sup>267</sup> In the view of the Court, the Princess was a private individual because she did not exercise official functions on the behalf of the State of Monaco.<sup>268</sup> The third distinction employed by the Court was between information on an individual's public and private life.<sup>269</sup> Only in special circumstances did the public have the right to learn of the latter.<sup>270</sup> These photographs combined the worst of all categories: as photographs of a private figure and of the private life of that figure, they deserved no protection.<sup>271</sup> Thus, the Court held that Germany, in permitting publication of the photographs, had violated the right to privacy under the European Convention on Human Rights.<sup>272</sup> In reaching this decision, the Court made only passing reference to Germany's margin of appreciation on the rights question.<sup>273</sup>

The purpose of this article is not to assess the correctness of the Court's balance between privacy and expression in the Princess of Monaco case. This consideration of the Court's reasoning is simply designed to show that there is ample room for disagreement on the matter. It would not be unreasonable to attach greater value to the photographs than was done in the case and, consequently, to find that the right to know about the Princess's activities trumped the Princess's right to privacy. This, in essence, is the conclusion that was reached by the German courts. The European Court of Human Rights failed to take heed of Germany's constitutional settlement.

#### IV. Tolerant and Intolerant Constitutional Patriotism

The contrast between the case law of the two courts is striking. Although the ECJ deferred to national law on the privacy-speech question, the ECtHR handled the matter directly under European law.<sup>274</sup> In this instance, given the circumstances of the two cases, the ECJ followed the better path. The *Lindqvist* judgment both affirmed a European commitment to privacy and free expression *and* made room for diverse moral

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267. *Id.* at 26 ("The Court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.").

268. *Id.*

269. *Id.* at 27 ("[T]he Court considers that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.").

270. *Id.* at 26.

271. *Id.* at 27.

272. *Id.* at 29.

273. *Id.* at 28.

274. Case C-101/01, *Criminal Proceedings Against Lindqvist*, 2003 E.C.R. I-12971, I-13024; *see also Von Hannover*, 40 Eur. H.R. Rep. at 20 (citing Article 8 of the Convention as the relevant standard).

orderings of public life at the national level.<sup>275</sup> In the future, the ECtHR would do well to make heavier use of the legal doctrine of margin of appreciation so as to negotiate a similar compromise between European universalism and national particularism.

Certainly, there are reasons for European courts to intervene directly in privacy cases. A national court's resolution of the right claims might be so clearly one-sided in favor of the government's interference with privacy or a competing rights claim that the decision constitutes a breach of European law. Furthermore, as a matter of institution-building, supranational courts must sometimes intervene. If supranational courts always hold for defending states, against complainants, they risk appearing to be mere puppets of those states, not independent lawgivers. However, neither of these reasons existed in the Princess of Monaco case. The German courts carefully considered the Princess's claims and, in the course of the litigation, progressively limited access to the Princess's private life.<sup>276</sup> The remaining right to know—the photographs of the Princess in non-secluded places by herself or in the company of other adults—had a plausible relationship to public debate.<sup>277</sup> The Princess of Monaco is a member of a ruling royal family.<sup>278</sup> She herself does not govern, but she does benefit directly from a system of public authority that, like all other such systems, should be subject to scrutiny, debate, and criticism. Germany's resolution of the privacy-speech conflict in favor of the press was not so biased as to constitute a breach of European law. The ECtHR was also not at risk of appearing to be a tool of powerful sovereign states. Set against the Court's long track record of deciding cases against defending states, a judgment in favor of Germany would not have had the appearance of capitulation to national interest.

Instead, in the Princess of Monaco case, the countervailing consideration of tolerance for constitutional pluralism should have prevailed. The German courts were expounding a national view of the right and good organization of public debate. That view was consistent with the constitutional law of certain other national systems and at odds with others. In the Princess of Monaco litigation itself, the lower courts acknowledged that, had French instead of German law applied, the case would have come down in favor of the Princess.<sup>279</sup> But the German decision in favor of the press was in line with the law in other European countries. For instance,

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275. *Lindqvist*, 2003 E.C.R. at I-13025.

276. See Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 19, 1995, 131 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 332 (F.R.G.), *translated in* BASIL S. MARKESINIS & HANNES UNBERATH, *THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE* 444, 449 (4th ed. 2002); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1999, 101 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 361 (F.R.G.), *translated in* MARKESINIS & UNBERATH, *supra*, at 450, 462.

277. See 101 BVerfGE 361, *translated in* MARKESINIS & UNBERATH, *supra* note 276, at 459-61.

278. See 131 BGHZ 332, *translated in* MARKESINIS & UNBERATH, *supra* note 276, at 445.

279. See 131 BGHZ 332, *translated in* MARKESINIS & UNBERATH, *supra* note 276, at 449.

under English law, the press would also have prevailed.<sup>280</sup> Given this diversity and the absence, still, of a thick European public sphere, the ECtHR should have deferred to Germany's constitutional settlement.

This, of course, was the outcome of *Lindqvist*.<sup>281</sup> In that case, the ECJ deferred to national constitutionalism by deliberately not deciding the privacy-speech conflict.<sup>282</sup> Instead, the ECJ sent the legal question back to the Swedish court.<sup>283</sup> This move was made possible by the preliminary reference system, a system of jurisdiction unavailable to the ECtHR. However, the ECtHR's longstanding doctrine of margin of appreciation can serve a similar end. Based on the margin of appreciation enjoyed by Member States, the ECtHR could have deferred to the privacy-speech balance struck by the German courts.

Many scholars take a dim view of the doctrine of margin of appreciation. The ECtHR's resort to the doctrine is cast as the abandonment of rights, morality, and reason in the face of powerful, oppressive states.<sup>284</sup> Yet, as demonstrated by this article's review of the ECJ's use of analogous doctrines, the margin of appreciation can serve good purposes too. It is not just a face-saving device for a supranational court opposed by powerful Member States. With deference doctrines, courts can construct a supranational constitutional order and, at the same time, recognize and respect national constitutionalism. Deference doctrines, like the margin of appreciation, can safeguard constitutional pluralism even as a single European constitution is being built.

To understand the contribution that such doctrines can make to constitutional pluralism, it is important to appreciate the difference between ordinary appellate review and review by one court of another court's determination of law based on a deferential standard of review. In an ordinary judicial system, higher courts generally do not give any special consideration to the determinations of law made by lower courts.<sup>285</sup> In other words, if a determination of law is appealed to a higher court, the higher court will decide the legal question *de novo*.<sup>286</sup> To take an example from the earlier

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280. See Sir Brian Neill, *Privacy: A Challenge for the Next Century*, in *PROTECTING PRIVACY* 1-4 (Basil S. Markesinis ed., 1999); see also *Campbell v. Mirror Group Newspapers, Ltd.*, [2004] UKHL 22, [2004] A.C. 457 (appeal taken from Eng.) (U.K.).

281. See Case C-101/01, *Criminal Proceedings Against Lindqvist*, 2003 E.C.R. I-12971, I-13029-30.

282. See *id.*

283. See *id.* ("It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.").

284. See Benvenisti, *supra* note 14, at 847; Letsas, *supra* note 14, at 731-32.

285. On the U.S. system, see HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL COURTS STANDARDS OF REVIEW* 6 (2007). On a typical European legal system, see Michele Taruffo, *Civil Procedure and the Path of a Civil Case*, in *INTRODUCTION TO ITALIAN LAW* 159, 176 (Jeffrey S. Lena & Ugo Mattei eds., 2002).

286. This discussion does not address appellate review of questions of fact. On questions of fact, higher courts generally defer to lower courts because lower courts are better equipped to establish the facts in a particular case. See EDWARDS & ELLIOTT, *supra* note 285, at 6-7. Moreover, a question of fact is, by definition, limited to the particular

discussion of the Princess of Monaco case, even though the German lower courts had already decided that a public figure like the Princess of Monaco could not assert a privacy right outside the home, the German Federal Court of Justice and then the Federal Constitutional Court each decided the question anew.<sup>287</sup> These courts could review the issues independently because courts in a single judicial system all share in the same judicial power, and the courts at the apex of the system relate hierarchically to the courts at the bottom of the system. In the interest of coming to the best resolution of a question of law—questions which, by definition, have implications for an entire legal system—a court of last resort is bound to give fresh consideration to the various interpretive possibilities.

By contrast, deferential standards of review carry an acknowledgment of the independent power of the government body under review. Such standards are employed routinely by national courts tasked with reviewing parliamentary laws and executive decisions.<sup>288</sup> The judicial branch recognizes that, under traditional separation of powers principles, the legislative and executive branches are vested with independent lawmaking and administrative powers.<sup>289</sup> Courts are not supposed to legislate or to execute, just to adjudicate.<sup>290</sup> In other words, judicial intervention is warranted only if the decision of the legislature or the executive appears to be so misguided as to violate a command set down in the constitution or, in the case of an administrative decision, the applicable legislation. Judicial deference is the doctrinal recognition of this system of separate powers.

Deference in supranational judicial systems signifies the same type of institutional relationship but between courts rather than branches of government. Each court—European and national—is vested with independent powers. National courts are authorized to interpret their national constitutions;<sup>291</sup> the two European courts are authorized to interpret the emerging European constitutional order.<sup>292</sup> Deferential review by the European courts represents an acknowledgment of the extensive set of moral commitments set down in national constitutions and the privileged role of national courts as interpreters of those moral commitments. The European

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case before the court and therefore a lower court's determination will not reverberate throughout the legal system. *See id.*

287. *See* 131 BGHZ 332, *translated in* MARKESINIS & UNBERATH, *supra* note 276, at 444-49; 101 BVerfGE 361, *translated in* MARKESINIS & UNBERATH, *supra* note 276, at 450-62.

288. *See* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 142-44 (4th ed. 2002). On review of laws, *see* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 629-36 (1997) (rational basis review).

289. For the conventional U.S. position, *see* CHERMERINSKY, *supra* note 288, at 1, 47. On the European position, *see* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 14-17, 35-37 (2d ed. 1985).

290. *See* CHERMERINSKY, *supra* note 288, at 46-48.

291. *See, e.g.,* Grundgesetz für die Bundesrepublik Deutschland (federal constitution) art. 93(1.1) (F.R.G.).

292. *See* Treaty Establishing a Constitution for Europe, art. I-29, Dec. 16, 2004, 2004 O.J. (C 310) 1, 24-25, *available at* <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>; Protocol 11, *supra* note 216, art. 32.

courts should intervene only if national constitutional authority is abused and the minimum standards set down in Europe's still-fledgling constitution are violated.

This argument in favor of the ECtHR's resort to the margin of appreciation does not take lightly the human rights critique of the doctrine. Human rights, undoubtedly, contain a universal, moral core.<sup>293</sup> Because human rights inhere in individuals as human beings, not as citizens of one nation or another, they should not vary depending on geography. They should give rise to the same treatment everywhere. Defending a universal set of human rights, however, is not incompatible with recognizing constitutional diversity. As the European Court of Justice did in the *Lindqvist* case, it is possible both to affirm a common, European privacy right and to hold that only morally repugnant interferences with the right will constitute a human rights violation. Otherwise, depending on the national context, the privacy right might be trumped by competing rights or public policies. The recognition of such pluralism, of course, narrows the reach of human rights law, but if Europe truly values its different traditions of social organization and political contestation, it does not seem that it could be otherwise.<sup>294</sup>

In the human rights world, the doctrine of the margin of appreciation has been the subject not only of critique but also of praise. The praise comes, essentially, in two varieties: the first casts the doctrine as advancing certain principles that are part and parcel of the moral architecture of human rights,<sup>295</sup> whereas the second treats the doctrine in pragmatic terms, as a necessary judicial tool in an international realm of sovereign states reluctant to accept the dictates of international institutions.<sup>296</sup> The constitutional patriotism analysis in this article contributes to this literature by advancing a separate reason for the normative desirability of the margin of appreciation: because the ECtHR defends a European constitution it should be sensitive to the imperatives of tolerance that are part of that constitution.

In essence, this analysis treats the ECtHR as a constitutional court, not simply an international human rights tribunal. The rights that are defended by the Court are not simply universal moral standards but individual entitlements that arise because of citizenship in a particular social community and political order—Europe. The ECtHR's stature as a consti-

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293. The debate on relativism versus universalism in the human rights arena and the implications for the ECtHR's margin of appreciation is extensive. For the universalist position and a critical view of the margin of appreciation, see Benvenisti, *supra* note 14, at 847; Letsas, *supra* note 14, at 731–32.

294. Joseph H.H. Weiler, *Human Rights, Constitutionalism and Integration: Iconography and Fetishism*, in *DEVELOPING A CONSTITUTION FOR EUROPE* 59, 66 (Erik Oddvar Eriksen et al. eds., 2004).

295. See, e.g., Carozza, *supra* note 15, at 46–50, 56–63 (arguing in favor of the margin of appreciation based on the human rights principle of subsidiarity); Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 10 HUMAN RTS L.J. 1, 2–3 (arguing in favor of the margin of appreciation based on subsidiarity, democracy, and cultural diversity).

296. See, e.g., Helfer & Slaughter, *supra* note 16, at 282–91.

tutional court is not a matter of explicit design but rather is a byproduct of the intertwined nature of rights in the European Union and the Council of Europe, as well as the incremental, yet spectacular, success of European integration. This article's earlier description of the many norms and institutions that guarantee a European right to privacy is but one example of the overlapping and self-reinforcing nature of rights in Europe today. The European Union's court—the ECJ—is widely recognized as a constitutional court. When the ECJ interprets the treaties and establishes fundamental principles of law, it gives shape to public power and individual rights throughout the European Union. It makes very little sense to deny this same constitutional status to the ECtHR when both the positive instruments and the judicial precedent that serve as the basis for their decisions are reciprocally determined and inextricably interwoven. Thus, under the theory of constitutional patriotism, both courts should be self-conscious of the importance of fundamental rights in their particular geographic and historical instantiations to national self-identities. Before reaching a European determination on any particular rights dilemma—like the privacy versus speech conflict in *Lindqvist* and *Von Hannover*—both courts should consider whether such a determination is truly warranted or whether, indeed, the best European constitutional outcome is tolerance of national diversity.

## Conclusion

The emerging European right to privacy reveals both the identity-creating potential and the diversity-suppressing dangers of constitutional patriotism. The right has spread to virtually every corner of European governance. Under the European Convention on Human Rights, privacy has been construed broadly to protect individuals against most types of observation—even in public places—and to protect individuals against the collection of most types of personal information—even if that information is considered banal or widely available. In addition to the European Convention on Human Rights, the Council of Europe has the Convention on Automatic Processing of Personal Data setting down a series of guarantees specific to *data* privacy that have been enacted domestically throughout Europe.

In the European Union, the Charter of Fundamental Rights recognizes not simply a general right to privacy but also a right to the protection of personal data. This more specific privacy right is also guaranteed throughout the common market by the European Union's detailed Data Protection Directive. When national police, customs officers, and courts cooperate on law enforcement and immigration policy, they are covered by a similar set of EU data protection laws.

Already the European Court of Human Rights and the European Court of Justice have been called upon to interpret this legal framework for privacy. These cases raise hard questions of constitutional law since individual claims to privacy routinely come into conflict with the right of others to

know—to engage in public debate, transact in the marketplace, or pursue different types of collective goods. By examining just one subset of this case law—the privacy-speech balance—it is possible to catch a glimpse of the community-building possibilities of a shared, European commitment to rights. In both *Lindqvist* and *Von Hannover*, the ECJ and the ECtHR proudly declared Europe’s respect for free expression and privacy. They also explained the importance of these rights to the European understanding of the morally good ordering of life in a human community. Quite obviously, for the ECJ and the ECtHR, liberal values constitute a source of European unity.

The ringing judicial affirmation in *Lindqvist* and *Von Hannover*, however, also carried illiberal undertones, as a court’s declaration of rights comes with the imperative to protect rights and decide cases regardless of another court’s resolution of the very same rights claim. In an intrinsically pluralist political order like Europe, this admittedly noble commitment to rights can become the illiberal imposition of a uniform, hegemonic constitutional identity. Thus, sometimes the impulse to defer to national courts on difficult questions of constitutional law, such as the privacy-speech balance in the *Lindqvist* and *Princess of Monaco* cases, can be the normatively superior outcome. In essence, the ECtHR and the ECJ are not like any ordinary set of constitutional courts. Their constitutional order is founded upon historically rooted, radical diversity. It is a nascent constitutional order, lacking the social and institutional infrastructure that would enable a genuinely European solution to many of the constitutional conflicts that emerge daily before national courts. Deference, for the European courts, is an essential instrument of tolerant—and patriotic—constitutionalism.



